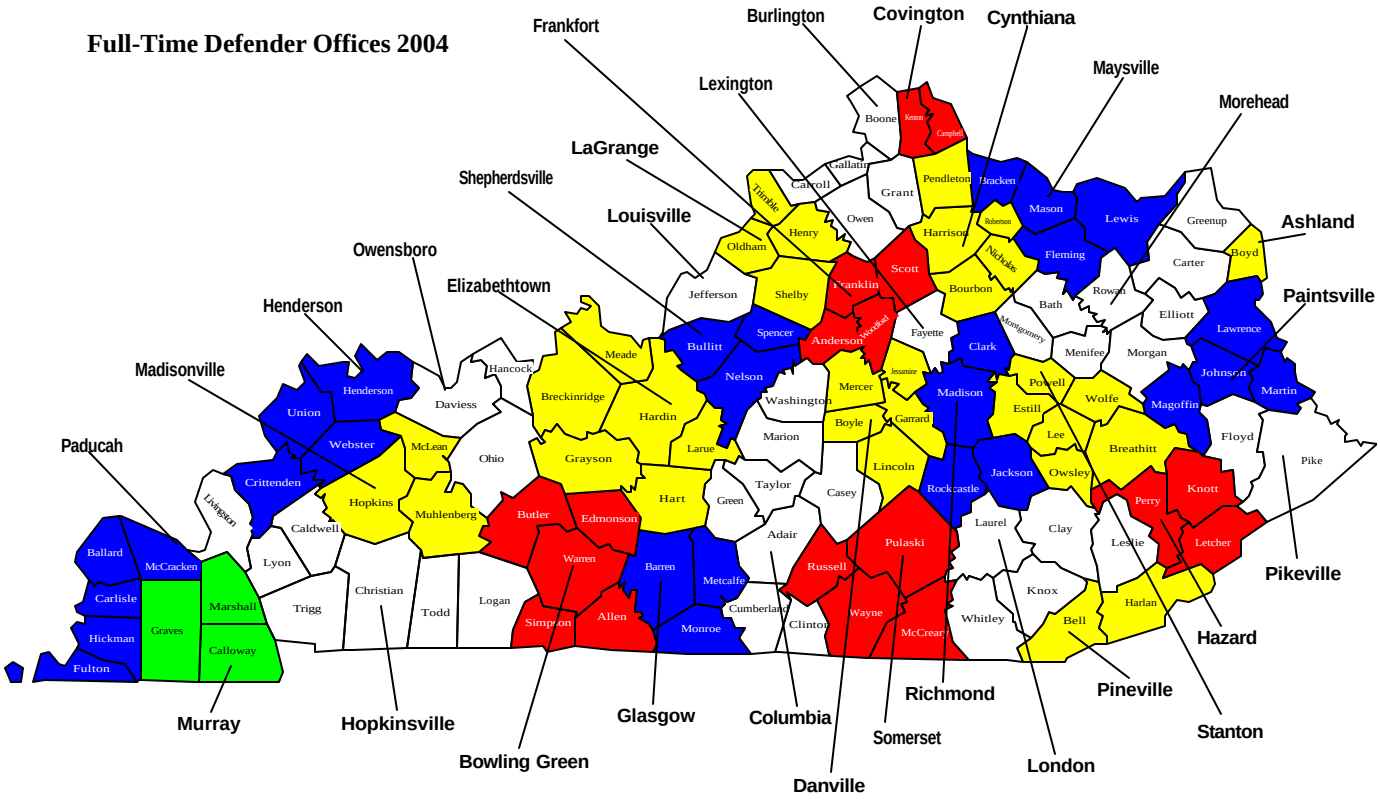
LEGISLATIVE UPDATE

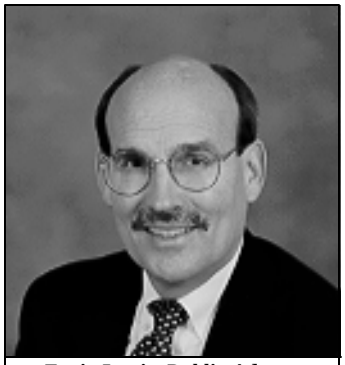
COVERING CRIMINAL JUSTICE LEGISLATIVE ISSUES

SUMMER 2002, NO. 14 — DEPARTMENT OF PUBLIC ADVOCACY

Completion of Full-time Defender System Within Reach



COMPLETION OF FULL-TIME DEFENDER SYSTEM WITHIN REACH



Ernie Lewis, Public Advocate

The Department of Public Advocacy's long-term goal of delivering services at the trial level in all 120 counties through a full-time office is within reach. The achievement of this goal will be accomplished as a result of the strong support of the Governor and the General Assembly. When reached, it will result in a higher level of services to indigents, greater accountability, and a superior level of service to the courts and the public.

The Dream Began in 1978

When KRS Chapter 31 was written in 1972, the original vision was for counties to select the type of delivery system they desired and to pay for it. The Public Advocate would approve the plan selected by the county, and distribute additional funds.

By 1978, it became clear that there were parts of Kentucky where the counties were either unwilling or unable to pay for indigent defense services. In response, Jack Farley, Public Advocate at the time, obtained a grant from LEAA to open a series of full-time offices in Eastern Kentucky. Thus was born the beginning of the full-time system in rural Kentucky.

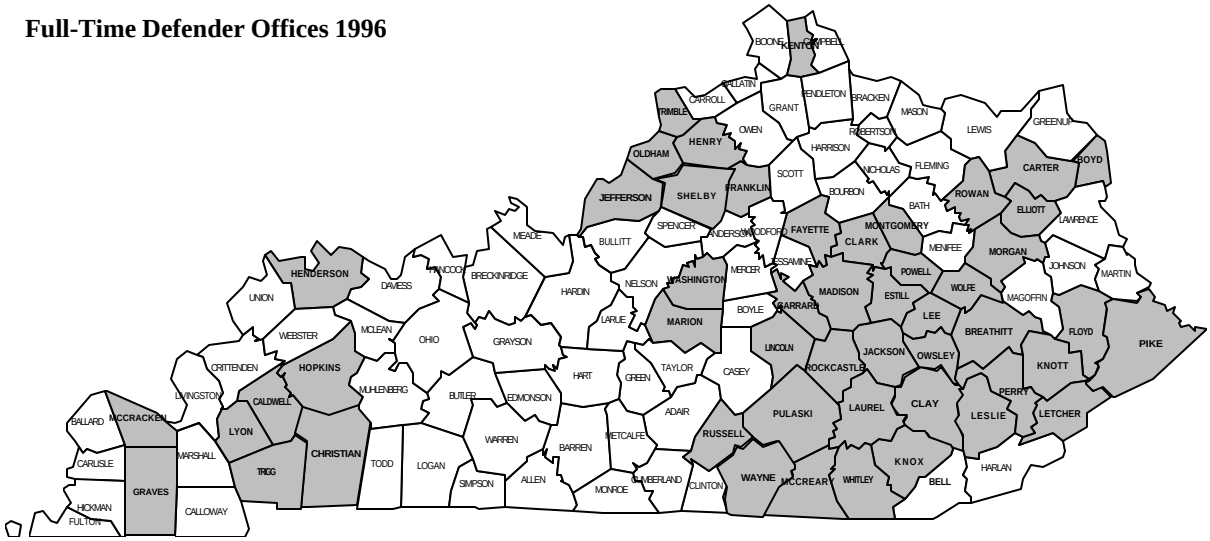
At the time, Kentucky already had 3 full-time offices, all county-run. Louisville and Boyd County had full-time offices functioning prior to the writing of Chapter 31. Fayette County Legal Aid was a part-time system which also predated Chapter 31 which converted to full-time in the late 1970s.

Full-time Offices Created in Response to Crises

By 1980 or so, there were offices in urban and Eastern Kentucky. The vast majority of Kentucky continued to provide services by using an assigned counsel system. However, year after year a budget shortfall occurred in the assigned counsel system. There simply was never enough money to pay individual lawyers on a case-by-case hourly rate. As a result, in 1982, the General Assembly passed a law providing counties the choice of either a full-time office or a contract. The assigned counsel method of delivery was eliminated. At the same time, the General Assembly funded numerous full-time offices across the Commonwealth. Attorneys were recruited for those offices, office sites were selected, and Kentucky was well on its way to a full-time system. However, the recession hit, and few of those offices opened.

Thereafter, from 1982-1996, Kentucky featured a mixed system of delivery. The previous full-time offices continued. Those counties with a contract in 1982 continued to provide services in that manner, with private lawyers on contract with the state to provide services. On occasion, no private attorneys were available to take cases, and the Department would

Full-Time Defender Offices 1996



create a full-time office in that community. That was the case in Richmond, Stanton, and several other places.
In 1990, the Public Advocacy Commission declared the completion of the full-time system as one of its goals. In the following years, an office opened in Covington and Elizabethtown. Most counties continued to be served by contract attorneys. Funding remained the age-old problem.

Full-Time System Advances After 1996

In 1996, there were full-time offices across the Commonwealth delivering services in 47 counties. 73 counties continued with a part-time contract system.

That is the year that I became the Public Advocate. As a public defender for 19 years at that time, and as a directing attorney in the Richmond Office, I was absolutely convinced that the best and most cost-effective service delivery method was that of a full-time office with private lawyers providing conflict services. I continue in that opinion. In 1996, I set as my primary goal the advancement of the full-time system. My modest goal was to cover 85% of the caseload by the end of my term. That goal has been amended now to the completion of the full-time system by the end of my term in July 2004.

Two offices opened early in my term. The Henderson Office was in the process of converting to full-time in the fall of 1996. A plan to open an office in Bell County was presented to the Interim Joint Committee on General Government and Public Protection, using money from revenue. The Committee endorsed the plan, and an office was opened in 1997.

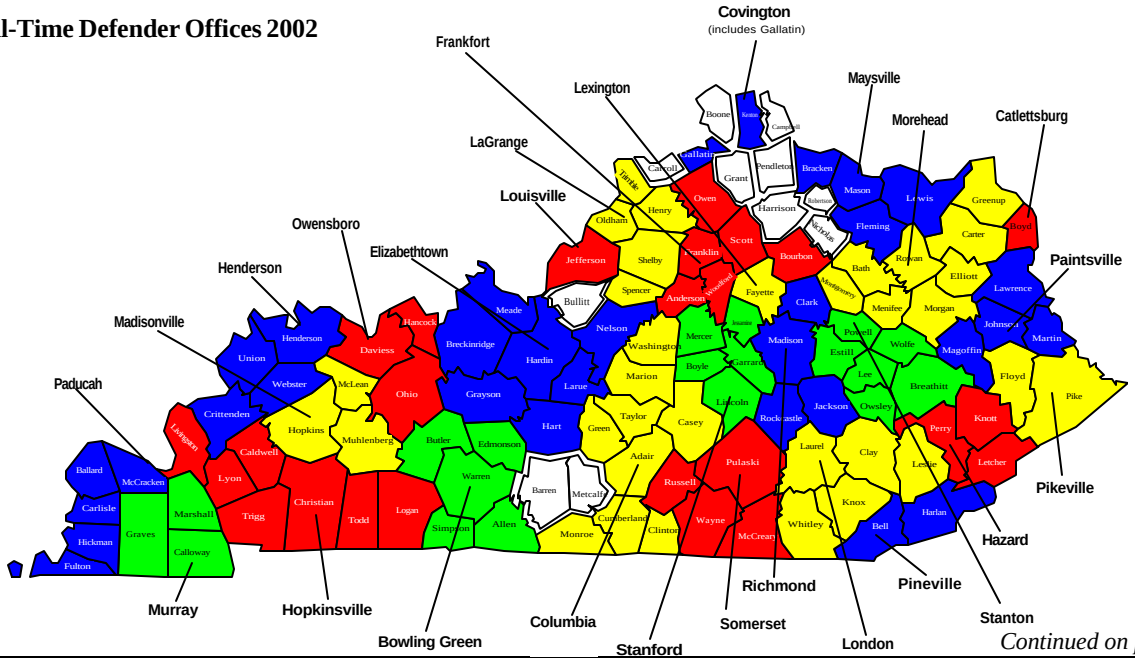
The 1998 General Assembly was presented with a plan to open 5 new full-time offices during the biennium. The General Assembly agreed, and placed $2.3 million into DPA's budget to open offices in Owensboro, Bowling Green, Columbia, Paintsville, and Maysville. Once those offices opened, the full-time delivery system had grown from 47 to 82 counties by 2000.

The Blue Ribbon Group Endorsed a Full-time System

In 1999, the *Blue Ribbon Group* (BRG) met and examined in detail the public defender delivery system in Kentucky. This group was chaired by Chief Justice turned Justice Cabinet Secretary Robert F. Stephens and former Rep. Mike Bowling, and included among its membership the current Chief Justice, Joe Lambert, Sen. David Williams, Sen. Larry Saunders, Rep. Harry Moberly, Rep. Jeff Hoover, Rep. Kathy Stein, former Rep. Jim Lovell, Commonwealth's Attorney and now Circuit Judge Phil Patton, Prof. Robert Lawson, the President and President-elect of the Kentucky Bar Association, Dick Clay and Donald Stepner, and other imminent Kentuckians. The BRG found that the "Department of Public Advocacy ranks at, or near, the bottom of public defender agencies nationwide in indigent defense cost-per-capita & cost-per case" and "at, or near, the bottom of public defender salaries nationwide for attorneys at all experience levels." The BRG called for $11.7 million to be added to the DPA General Fund. Recommendation #3 was that "the full-time system should be completed."

The 2000 General Assembly responded to the BRG by adopting the Governor's Budget, which called for $4 million in FY01 and $6 million in FY02 to be added to DPA's General Fund monies. In addition to higher salaries for defenders, this money was used primarily to extend the full-time system into additional counties. Counties surrounding the new offices

Full-Time Defender Offices 2002



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were incorporated into those offices. A new office was opened in Murray; another office is scheduled to come on-line in August in Bullitt County. By the end of this biennium, 110 counties will be covered by a full-time office.

Completing the System is Now Within Reach

The DPA's 2002 budget request was for the remaining $5.7 million that would have completed all of the *Blue Ribbon Group* recommendations. However, the recession and the events of September 11 made it impossible for that budget to move forward.

The Governor proposed in his initial budget request, however, that two new full-time offices be opened in Boone County and Cynthiana. These offices would cover 7 additional counties, leaving only Barren, Metcalfe, and Campbell Counties in the contract column. The General Assembly passed this portion of the Governor's Budget both during the regular and the Special Session. At the time of this writing, the status of the overall budget is unclear. However, it is hoped that these two offices will be funded during the biennium under most scenarios for establishing a budget.

Further, HB452, the Court Costs Bill, moved DPA forward somewhat in the collection of revenue. It abolished the administrative fee of KRS 31.051, which resulted in approximately $850,000 of revenue each year. It allowed for DPA to receive 3.5% in court costs, with a cap of $1.75 million. At this point, it is unknown how much money will be recovered through the court costs bill. However, I am confident that DPA will receive the full amount up to the cap. We will know more by the fall of 2002. If as expected DPA receives the full amount of the cap, I plan to go before the Interim Committee on General Government and Public Protection again and present a plan to complete the full-time system with that revenue.

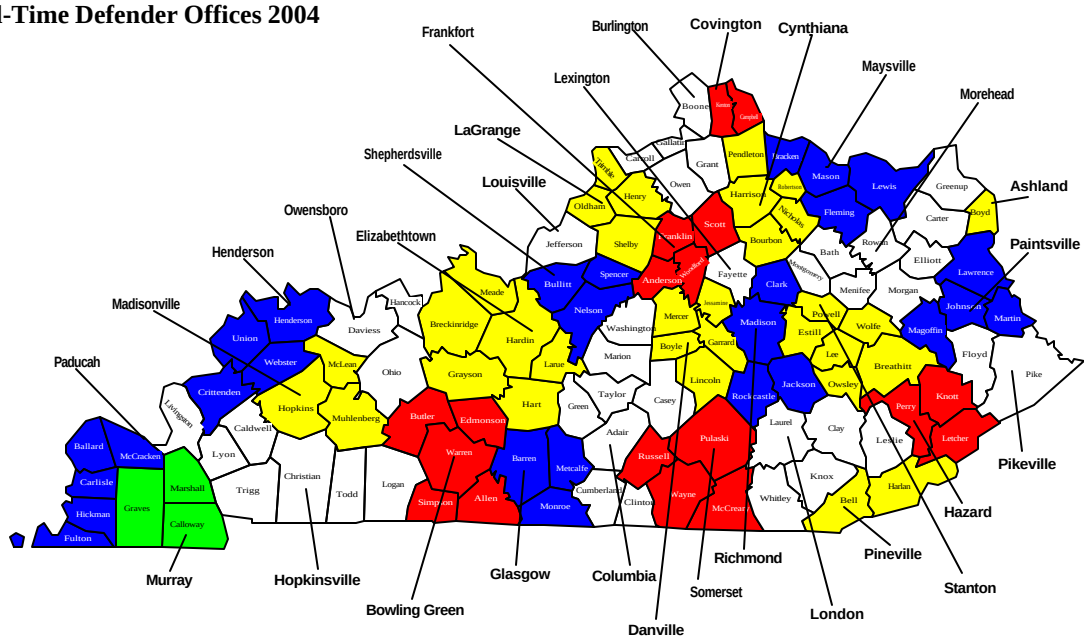
The task to complete the system now is simple. An office can be opened in Glasgow to cover Barren and Metcalfe (and Monroe County, now covered by Columbia, would likely be added). Further, Campbell County can be covered from the Covington Office. It is believed that these offices can be covered by combining the present contract amount, the partial fee, and some of the new court cost monies.

There Will Be Additional Needs

With the addition of these last 3 counties, the full-time system will be completed structurally. However, because the full $5.7 was not put into DPA's budget, several important needs remain.

It is important that enough attorneys are placed in the offices to ensure a reasonable caseload level. *The Blue Ribbon Group* found that DPA "per attorney caseload far exceeds national caseload standards," and recommended that "full-time trial staff should be increased to bring caseloads per attorney closer to the national standards. The figure should be no more than 350 in rural areas and 450 in urban areas." The BRG had recommended 35 additional attorneys to achieve this goal. The 2000 General Assembly funded 10 "caseload reduction" lawyers. However, as a result of the budget short-

Full-Time Defender Offices 2004



fall of FY02, DPA was able to fund only 5 of those positions. Serious caseload concerns remain in several of DPA's highest caseload offices. In order to complete fully the full-time system at the trial level, the 2004 General Assembly will be asked to fund sufficient caseload reduction lawyers to establish reasonable caseloads.

It is also important that there be sufficient support staff. Otherwise, lawyers with large caseloads must not only represent their clients, they are also saddled with clerical and investigative duties. At present, there are 5 offices which do not have sufficient support staff. DPA has a secretary-to-attorney ratio of 3/1. At least 5 additional secretaries need to be added to the system to ensure sufficient support staff are available in those offices. Monies to fund these staff will be requested in 2004 if DPA is unable to raise sufficient revenue during this next biennium to fund them.

Kentucky Will Have a Delivery System We Can Be Proud Of

The *ABA Standards for Criminal Justice Providing Defense Services*, 3d Ed. (1992), Standard 5-1.2 states that the "legal representation plan for each jurisdiction should provide for the services of a full-time defender organization when population and caseload are sufficient to support such an organization. Multi-jurisdictional organizations may be appropriate in rural areas…Every system should include the active and substantial participation of the private bar…Conditions may make it preferable to create a statewide system of defense."

The American Council of Chief Defenders has recently completed *The Ten Principles of a Public Defender Deliver System.* This was adopted by the American Bar Association in February 2002. Principle #2 reads: "Where the caseload is sufficiently high, the public defense system consists of both a defender office and the active participation of the private bar…Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide."

Kentucky is nearing the meeting of these significant benchmarks. The Department of Public Advocacy is a statewide public defender system established in a model statute in 1972. Inadequate funding for three decades has deprived Kentucky of meeting the potential envisioned in the statute. Since 1996, however, the Governor and the General Assembly have moved Kentucky toward meeting the goal of both of these standards. We will be able in all likelihood by 2003 to have all 120 counties covered by a full-time system, with full-time offices in 3 urban areas, and the other counties covered by a multi-jurisdictional full-time office. The private bar remains involved through representing conflicts of interest in those full-time offices.

This will be a system of which Kentucky can be proud. It will feature reasonably compensated public defenders with caseloads they can ethically handle representing clients in all 120 counties. Courts will be served better by having well-trained defenders in their courts. The public will be better served by having indigents and their families receive excellent service. The Commonwealth will be served by having a system that is accountable. And the criminal justice system will be served by having an indigent defense system that can be trusted to produce reliable results. ■

Ernie Lewis, Public Advocate

The Belief in Justice

One of the great things about this nation is that we believe that we will get justice. We have a great belief in justice for all and in order to try to administer justice as completely and accurately as we can we have a very complex system with lots of safeguards, hopefully for the victims and the accused. But, it does require help in the navigation of that system. It does require the assistance of someone that is trained and has the knowledge to help an individual get through the system – an attorney and of course they have to be paid, they have to make a living. If you happen to be in a situation where you have to go through the court system and you just can't afford an attorney, it is vital if our system is going to work, if our system is going to work for all, then all have to have access to competent and adequate representation when they come before the courts of justice. And of course that is what our Department of Public Advocacy does....

Remark of Governor Paul E. Patton on the opening of the Department of Public Advocacy on the Murray State University campus, August 31, 2000.

DEFENDER CASELOADS RISE IN FY01 AND FIRST NINE MONTHS OF FY02

Public defender caseloads have risen 3% at the trial level in FY01 ending July 1, 2001. In addition, caseloads have risen at an annual rate of an additional 5.9% during the first nine months of FY02. These caseload increases, despite a still-declining crime rate, threaten to overwhelm trial offices where caseloads are already at well over recommended national standards.

Blue Ribbon Group as Concerned About High Caseloads

The Blue Ribbon Group, a group of 22 influential Kentucky citizens chaired by former Chief Justice Robert F. Stephens and former House Judiciary Chair Mike Bowling, issued a report on Kentucky's indigent defense system on June 1, 1999. In that report, they expressed concern about Kentucky public defenders carrying excessive caseloads.

Finding #5 stated that "the Department of Public Advocacy per attorney caseload far exceeds national standards." As a result, the *Blue Ribbon Group* recommended in Recommendation #6 that "full-time trial staff should be increased to bring caseloads per attorney closer to the national standards. The figure should be no more than 350 in rural areas and 450 in urban areas."

To alleviate these concerns, the *Blue Ribbon Group* recommended the hiring of 35 additional attorneys to reduce excessive caseloads.

2000 General Assembly Funds 10 Caseload Reduction Attorneys

The Department of Public Advocacy requested funding for 35 caseload reduction attorneys in its 2000 budget request in response to the *Blue Ribbon Group* report. This was part of the $11.7 million that the *Blue Ribbon Group* recommended DPA receive in additional General Fund monies in order to rise from the bottom to the middle of the states in support for indigent defense.

However, the 2000 General Assembly funded DPA only for 10 caseload reduction lawyers. Rather than $11.7 million, the 2000 General Assembly funded DPA at $4 million for FY01, and $6 million for FY02 in additional General Fund dollars. The 10 caseload reduction lawyers were funded to begin in April of 2002, with the full funding for those lawyers to be placed in the 2002 budget.

Modest Caseload Reduction Stymied by Budget Reductions

Even the modest caseload reduction funded by the General Assembly in the 2000 budget has not been realized. In FY01, declining revenues caused the DPA's budget to be reduced by approximately $490,000.

In FY02, DPA's $28 million dollar budget was reduced by $750,000. As a result, DPA was able to hire only 5 of the 10 caseload reduction lawyers. Thus, what was originally a 35 attorney addition to reduce caseloads has turned into only 5 attorneys who have been placed in the highest caseload offices across the state.

FY01 Annual Caseload Report Demonstrates Continuing Need

The Department of Public Advocacy FY01 Annual Caseload Report demonstrates that the 35 originally requested caseload reduction attorneys remain a significant need for the Department.

The report demonstrates that the average DPA trial attorney opened 420 new cases in FY01. This was a mixed caseload of felonies, misdemeanors, and juvenile cases. The figure includes capital cases. 420 cases per lawyer compares to 310 cases per lawyer, which represents the national standard for attorneys with a mixed caseload. This figure is down from 428 in FY00, and down further from FY99, when the caseload was 475 per lawyer.

The total caseload represents a 3% increase from FY00. Total trial level cases were 98,520 in FY01. This 3% increase occurred despite a decline in the crime rate in Kentucky. This increase in caseload reflects an increase in public defender appointments in new full-time offices.

Six offices were in deep caseload trouble in FY01, with over 500 new cases per lawyer. Those offices were:

- Columbia—545 cases per lawyer
- Elizabethtown—606 cases per lawyer
- Hazard—502 cases per lawyer
- Henderson—591 cases per lawyer
- Maysville—574 cases per lawyer
- Paducah—603 cases per lawyer

As a result of these unethically high caseloads, the Department placed a new lawyer in each of the offices. 5 of the caseload reduction lawyer positions were utilized; in addition, the Department found an additional position and placed it in this group as well in recognition of the caseload crisis.

However, the Department was not able to place the remaining 5 caseload reduction lawyer positions in other offices with excessive caseloads. In FY01, there were 7 offices with caseloads in excess of the statewide average of 420. Those offices were:

- Bell County—448 cases per lawyer
- Frankfort—483 cases per lawyer
- Hopkinsville—472 cases per lawyer
- London—472 cases per lawyer
- Madisonville—496 cases per lawyer
- Morehead—445 cases per lawyer
- Owensboro—426 cases per lawyer

Caseloads Rise Another 5.9% in the First Nine Months of FY02

Caseload relief is not going to occur through a downturn in appointments, at least not this year. During the first 9 months of FY02, caseloads have gone up an additional 5.9% Average caseloads in the state have increased slightly from 420 to 434 cases per lawyer. The Department has identified six offices that are the crisis level These include:

- Bell County—584 cases per lawyer
- Columbia—501 cases per lawyer
- Elizabethtown—581 cases per lawyer
- Frankfort—556 cases per lawyer
- Hopkinsville—544 cases per lawyer
- Paducah—540 cases per lawyer

When caseloads rise over 500, quality of representation is threatened, and the reliability of verdicts must be questioned.

In addition, there are two other offices that are approaching the 500 mark, and thus have excessive caseloads far above national norms. These offices are Hazard (480 cases), and Madisonville (486 cases).

FY03-04 Budget will not Relieve the Caseload Crisis

DPA sought in its 2002 budget request to complete the *Blue Ribbon Group* recommendations. This completion would have cost an additional $5.7 million in General Fund dollars. It would have included sufficient monies to reduce significantly excessive caseloads for Kentucky's trial level public defenders.

However, the now familiar budget shortfall has short-circuited DPA's attempt to alleviate the caseload crisis. The Governor's budget did not include any money for caseload reduction attorneys. Worse, it did not fund 26 existing positions. The budget passed by the House and the Senate affirmed the Governor's budget as it relates to DPA. During the recently ended Special Session, DPA's budget continued at the approximate level of the Governor's original budget. It is unclear at the time of this writing whether a budget will be passed this year.

The effect of this is that DPA likely will not receive any caseload relief during the next biennium. DPA likely will have 26 unfunded positions. DPA will not be funded for any caseload reduction attorneys. If caseloads continue to rise, a crisis is imminent.

The only relief in sight is the possibility of an increase in revenue for DPA. HB452, the Court Cost Bill, which replaced DPA's administrative fee with inclusion in court costs, may bring some relief to DPA's caseload crisis. It will be the fall of 2002 before we will be able to determine the trend with this new revenue stream. In the meantime, many of DPA's trial level attorneys will continue to carry caseloads far excess of national norms.

The 2004 General Assembly Must Address Excessive Defender Caseloads

The caseload crisis for Kentucky public defenders is real. DPA will continue to monitor its caseload. The next indicator will occur with the Annual Caseload Report for FY02. If this report indicates a continuation of the existing trends, DPA will have to come before the 2004 General Assembly and make its case for a significant increase in monies to lower these excessive caseloads. Even the best of trial attorneys cannot provide effective assistance when her caseload is excessively high. Kentucky depends upon its public defenders to ensure the reliability of verdicts at the trial level. Kentucky's judiciary counts upon public defenders to move their dockets and ensure that due process is being provided. Excessive trial level caseloads threaten both the reliability of verdicts and the ability of Kentucky public defenders to serve the judiciary and the public. ■

Ernie Lewis
Public Advocate

There can be no equal justice when the kind of a trial a man gets depends on the amount of money he has.

-- Hugo Black, *Griffin v. Illinois*, 351 US 12, 19 (1956)

CRIMINAL JUSTICE LEGISLATION OF THE 2002 GENERAL ASSEMBLY

PUBLIC DEFENDERS

HOUSE BILL 487

This bill is basically a rewrite of KRS Chapter 31. Among the changes made by this statute are the following:

- The enabling statute for the Department of Public Advocacy, KRS Chapter 31, has been reorganized, with like sections placed together in a more rational manner. This is particularly apparent in the organizational section describing the various plans for delivery of trial-level services.
- The Public Advocacy Commission has altered membership to comply with case law. Two members previously appointed by the Speaker of the House and the President Pro-tem of the Senate are replaced by the Executive Director of the Criminal Justice Council and a child advocate to be appointed by the Governor. Commission members will receive $100 per day for each meeting attended.
- P&A language has been altered to make the statute consistent with additional enabling federal legislation.
- The Department is authorized to purchase liability insurance to cover attorneys with whom the Department contracts, including attorneys in part-time counties as well as those on conflict contracts with individual DPA offices.
- The statute clarifies that status offenders are eligible to be appointed a public defender.
- Children who are presently represented by the Juvenile Post-Dispositional Branch pursuant to the *MK v. Wallace* Consent Decree are now defined as eligible for public defender services. Those who are "residing in a residential treatment center or detention center" are entitled to be represented whether needy or not "on a legal claim related to his or her confinement involving violations of federal or state statutory rights or constitutional rights."
- The eligibility standard has been altered considerably. The previous prima facie standard has been eliminated. The judge now must look at all factors to determine eligibility. The list of factors has been expanded to include "source of income," "number of motor vehicles owned and in working condition," "other assets," "the poverty level income guidelines compiled and published by the United States Department of Labor," "complexity of the case," "amount a private attorney charges for similar services," "amount of time an attorney would reasonably spend on the case," and "any other circumstances presented to the court relevant to financial status."
- The affidavit of indigency has been altered to include a variety of benefits that he/she may be receiving. It also explicitly informs the person that he understands that "he or she may be held responsible for the payment of part of the cost of legal representation."
- KRS 31.185 is amended to read that a public defender may request to be "heard ex parte and on the record with regard to using private facilities."
- The previous "recoupment" fee is now referred to as a "partial fee." The partial fee is now converted to a "civil judgment subject to collection." Partial fees continue to be returned to the county where the county has selected a plan; in all those counties where there is a full-time office run by the state, the partial fee returns to the Department.
- The administrative fee of KRS 31.051 is abolished, replaced in HB452 by being included in court costs.

SEX OFFENSES

SENATE BILL 25

This bill includes GHB and flunitrazepam in both the trafficking and possession portions of KRS 218A, covered below. In addition, the following changes are included in the sex offense statutes:

- Rape and sodomy in the second degree are expanded to include engaging in sexual intercourse, or deviate sexual intercourse, with someone who is "mentally incapacitated." This was previously included in the rape and sodomy in the third degree statutes.
- Sexual abuse in the first degree is expanded to include making sexual contact with someone who is incapable of consent because they are mentally incapacitated. This was previously included as sexual abuse in the second degree.
- Sexual abuse in the first degree previously contained the element that someone is guilty if they subject another person to sexual contact who is incapable of consent because they are "physically helpless." The "physically helpless" definition is expanded to include "a person who has been rendered unconscious or for any other reason is physically unable to communicate an unwillingness to an act as a result of the influence of a controlled substance or legend drug."

SENATE BILL 227

This bill expands the crimes of third degree rape, third degree sodomy, and second degree sexual abuse to include the sexual intercourse or sexual contact (in the case of sexual abuse) by someone over 21 with someone under 18 "and for whom he provides a foster family home."

HOUSE BILL 310

A new crime called video voyeurism is created in KRS Chapter 531, with the following features:

- The crime is defined as using "any camera, videotape, photooptical, photoelectric, or other image recording device for the purpose of observing, viewing, photographing, filming, or videotaping the sexual conduct, genitals, or nipple of the female breast of another person without that person's consent."
- The crime also requires the using of the image for consideration or the distribution of the image "by live or recorded visual medium, electronic mail, the Internet, or a commercial on-line service."
- The statute does not apply to the "transference of prohibited images by a telephone company, a cable television company" or similar agencies.
- Video voyeurism is a Class D felony.

HOUSE BILL 133

A crime called voyeurism is created in KRS Chapter 531 making it unlawful to trespass and observe sexual conduct or nudity, with the following features:

- The primary definition is the same as video voyeurism.
- The crime is distinguished from video voyeurism by the omission of the requirement that the image be used, divulged, or distributed.
- Voyeurism includes the entering or remaining unlawfully "in or upon the premises of another for the purpose of observing or viewing the sexual conduct, genitals, or nipple of the female breast of another person without the person's consent."
- To constitute voyeurism the victim must be in a place "where a reasonable person would believe that his or her sexual conduct, genitals, or nipple of the female breast will not be observed, viewed, photographed, filmed, or videotaped without his or her knowledge."
- Voyeurism is a Class A misdemeanor.

KIDNAPPING AND VIOLENT OFFENDER

SENATE BILL 26

This bill has two significant provisions:

- Kidnapping is expanded to include under KRS 509.040, the deprivation of the "parents or guardian of the custody of a minor, when the person taking the minor is not a person exercising custodial control or supervision of the minor…"
- The violent offender statute, KRS 439.3401, is expanded to include persons convicted of robbery in the first degree and burglary in the first degree when "accompanied by the commission or attempted commission of a felony sexual offense in KRS Chapter 510, burglary in the first degree accompanied by the commission or attempted commission of an assault described in KRS 508.010, 508.020, 508.032, or 508.060, burglary in the first degree accompanied by commission or attempted commission of kidnapping as prohibited by KRS 509.040…" Thus, first degree burglary during the commission of first degree and second degree assault, or during the commission of a third conviction of fourth degree domestic assault, or during the commission of wanton endangerment in the first degree, is now a violent offense.
- There is a curious provision stating that the violent offender expansion as it pertains to robbery in the first degree "shall apply only to persons whose crime was committed after the effective date of this Act." The implication is that the expansion of violent offender to burglary in the first degree is not so limited. If this portion of the bill were applied to those whose crimes were committed prior to July 15, 2002, this would be open to challenge.
- The application of violent offender to burglary in the first degree is also open to challenge under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d. 435 (2000) due to there being no provision for the jury making the factual determination.

DNA

HOUSE BILL 4

This is a significant piece of legislation that both expands the DNA database and ensures that samples are preserved. Among its provisions are the following:

- Persons already sentenced to death may request DNA testing and analysis of an item that may contain biological evidence related to the investigation or prosecution. The Court must order testing and analysis if a reasonable probability exists that the person would not have been prosecuted if results of testing had been exculpatory, and if the evidence can still be tested and was not previously tested. The Court may order testing and analysis if a reasonable probability exists that the person's verdict or sentence would have been more favorable with the results of the DNA or that the results will be exculpatory. If the Court orders testing and analysis, appointment of counsel is mandatory. If the sample has been previously tested, both sides must turn over underlying data and lab notes. Once a request is made, the Court must order the Commonwealth to preserve all samples that may be subject to testing. If the results are not favorable to the person, the request or petition must be dismissed. If the results are favorable, "notwithstanding any other provision of law that would bar a hearing as untimely," the Court must order a hearing and "make any further orders that are required."
- When a person is accused of a capital offense, either the Commonwealth or the defense may move for a sample to be subject to DNA testing and analysis. The testing is to be done at a KSP laboratory or a laboratory selected by the KSP. Up to 5 items may be tested with the costs to be borne presumably by the lab; testing of additional items "shall be borne by the agency or person requesting the testing and analysis."
- The DNA database is expanded to include persons convicted of or attempting to commit unlawful transaction with a minor in the first degree, use of a minor in a sexual

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performance, promoting a sexual performance by a minor, burglary in the first degree, burglary in the second degree, and all juveniles adjudicated delinquent for these offenses. The database is also expanded for all persons convicted of capital offenses, Class A felonies, and Class B felonies involving "the death of the victim or serious physical injury to the victim."

- Items of evidence that may be subject to DNA testing may not be disposed of prior to trial unless the prosecution demonstrates that the defendant will not be tried, and a hearing has been held in which the defendant and prosecution both have an opportunity to be heard.
- Items of evidence that may be subject to DNA testing may not be disposed of following a trial unless the evidence has been tested and analyzed and presented at the trial, or if not introduced at trial an adversarial hearing has been held, or unless the defendant was found not guilty or the charges were dismissed after jeopardy attached and an adversarial hearing was conducted. The burden of proof for the destruction of samples will be upon the party making the motion.
- Destruction of evidence in violation of this statute is a violation of the tampering with physical evidence statute (KRS 524.100).
- Evidence must be retained "for the period of time that any person remains incarcerated in connection with the case" unless there has been a hearing and an order to destroy the evidence.
- The statute is effective on July 15, 2002. However, an elaborate implementation date mechanism is included in the statute that allows expansion of the database as funding becomes available.

JUVENILE JUSTICE

The Department of Juvenile Justice succeeded in passing three pieces of agency legislation, all of which had been previously introduced unsuccessfully.

HOUSE BILL 144

This bill makes a variety of significant changes in juvenile law, including:

- The Juvenile Justice Advisory Board and Juvenile Justice Advisory Committee are made into one board with newly constituted membership.
- The consent decree of *MK v. Wallace* is memorialized into KRS 15A.065. This requires DJJ "in cooperation with the Department of Public Advocacy" to develop a "program of legal services for juveniles committed to the department who are placed in state-operated residential treatment facilities and juveniles in the physical custody of the department who are detained in a state-operated detention facility, who have legal claims related to their confinement involving violations of federal or state statutory or constitutional rights."
- DJJ employees will be able to give depositions rather than personal testimony in civil cases arising out of their employment; however, "if the court in which the civil action is pending finds that the witness is a necessary witness for trial, that court may order the personal attendance of the witness at trial."
- No child 10 or under may be placed in a DJJ facility or a juvenile detention facility unless charged with a Class A, Class B, or capital offense when there are less restrictive alternatives available.
- Detention costs may be assessed against a parent when a hearing has been held and it has been determined that the child has a previous specific record and that the "failure or neglect of the parent to properly supervise or control the child is a substantial contributing factor of the act or acts of the child upon which the proceeding is based" and that the parents have the ability to pay.
- Eliminates the need for an administrative hearing when a committed child escapes from custody. Children who escape or are absent without leave from placement are to be returned to active custody of DJJ within three days.
- Establishes a limited privilege for communications during diagnosis and treatment by an offender and a member of his family with a DJJ employee or other treatment provider, unless the offender consents or unless the communication "is related to an ongoing criminal investigation." Further exceptions to the privilege include communications to determine "whether the sexual offender should continue to participate in the program," to conduct in which the offender was not a participant, and to "any disclosure involving a homicide."
- Youthful offenders may remain in DJJ custody until they are 21 after DJJ consults with the Department of Corrections. This placement may end if the offender "causes any disruption to the program or attempts to escape." When the youth turns 21 he is transferred to DOC. A retained youthful offender may, after serving 12 months additional time, petition on one occasion for reconsideration of probation and early parole so long as he is not a violent offender under KRS 439.3401.

HOUSE BILL 145

This is primarily a piece of clean-up legislation with some of the following features:

- DJJ is given the authority to decertify county-run juvenile detention facilities.
- Children convicted of traffic offenses are to spend their time of confinement in a juvenile facility until they turn 18, and thereafter in an adult detention facility.
- Children subject to the automatic transfer for use of a firearm under KRS 635.020(4) shall be returned at the age of 18 to the sentencing court for an 18-year old hearing consistent with KRS 640.030(2).
- DJJ is required to provide a child's offense history to the superintendent of the local school district where the child is placed.
- The right to treatment includes the right to "have that

treatment administered in the county of residence of the custodial parent or parents or in the nearest available county."

HOUSE BILL 146

This is a bill that addresses the issue of the absence of counsel that has been predominant, with the following features:

- All children who are charged with a felony or a sex offense must be represented by counsel.
- The court may not deny any child's liberty unless they are represented by counsel.
- Children outside the mandatory counsel provisions must still be represented by counsel unless they waive counsel at a hearing where specific findings of fact are entered indicative of a knowing and intelligent and voluntary waiver.

CHILD SEXUAL ABUSE

House Bill 393

This bill makes a number of changes to the law pertaining to "children's advocacy centers" as well as the following important provisions for lawyers defending a person accused of child sexual abuse:

- Employees of children's advocacy centers are given immunity from civil liability "arising from performance within the scope of the person's duties."
- The files, reports, and other documents are made confidential outside of Cabinet, law enforcement, prosecutors, medical professionals and the court. The records may also be disclosed pursuant to a court order. Significantly, this change "shall not be construed as to contravene the Rules of Criminal Procedure relating to discovery."
- An interview of a child "shall not be duplicated except that the Commonwealth's or county attorney prosecuting the case may make and retain one copy of the interview and make one copy for the defendant's counsel that the defendant's counsel shall not duplicate."
- The copy of the interview with the child must be turned over to the court clerk at the close of the case.
- All recorded interviews that are introduced into evidence or are in the possession of the children's advocacy center, law enforcement, the prosecution, or the court, must be sealed unless the sealing is objected to by the victim.
- The provisions pertaining to the copies of the recorded interviews also contain the proviso that they "shall not be construed as to contravene the Rules of Criminal Procedure relating to discovery."

CONTROLLED SUBSTANCES

HOUSE BILL 26

This bill requires the Governor's Office of Technology to submit a drug diversion grant to "fund a pilot project to study a real-time electronic monitoring system for Schedules II, III, IV, and V controlled substances" in two rural counties.

HOUSE BILL 644

This bill creates two new methamphetamine crimes. It creates the crimes of possession of a methamphetamine precursor and distribution of a methamphetamine precursor, with the following features:

- The elements of possession of a methamphetamine precursor crime are the knowing and unlawfully possession of a "drug product containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the product as a precursor to methamphetamine or other controlled substance."
- Possession of the product "containing more than twenty-four (24) grams" is "prima facie evidence of the intent to use the drug product as a precursor…"
- Possession of a methamphetamine precursor is a Class D felony for the first offense and Class C felony for each subsequent offense.
- The unlawful distribution of a methamphetamine precursor is defined as the knowing selling, transferring, distributing, dispensing, or possessing with the intent to sell, transfer, distribute, or dispense any of the methamphetamine precursors. This offense is a Class D felony for the first offense, and Class C felony for the second offense.

Senate Bill 25

The trafficking in a controlled substance statute, KRS 218A.1412, is expanded to include "gamma hydroxybutyric acid (GHB) and flunitrazepam. Likewise, GHB and flunitrazepam are included in KRS 218A.1415, possession of a controlled substance in the first degree. There are other provisions to this bill that are covered in the Sex Offender portion of this outline.

DOMESTIC VIOLENCE

HOUSE BILL 428

This bill amends KRS 508.130 to provide for a permanent restraining order for stalking victims, with the following other features:

- Creates an assumption of an application for a restraining order application upon a conviction of either first or second degree stalking.
- A hearing is held on the application unless the defendant waives it.
- The hearing is to be held "at the time of the verdict or plea of guilty." This is a curious section, since the verdict operates as an application for a restraining order.
- The Court may in the restraining order prohibit the defendant from entering the residence, property, school, or play of employment of the victim, as well as making contact with the victim personally or through someone else. The order is required to "protect the defendant's right to employment, education, or the right to do legitimate busi-

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ness with the employer of a stalking victim as long as the defendant does not have contact with the stalking victim."

- The restraining order "shall be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim…"
- The restraining order "shall not operate as a ban on the purchase or possession of firearms or ammunition by the defendant" unless he has been convicted of a felony, i.e. stalking in the first degree.
- The restraining order lasts in the discretion of the court, but may not last longer than 10 years.
- A violation of the restraining order constitutes a Class A misdemeanor.
- An officer with probable cause that the defendant has violated a restraining order may arrest without a warrant even where the violation has not occurred in the presence of the officer.

SENATE BILL 89

This bill requires the Justice Cabinet to make a reasonable effort to notify the petitioner who obtained a domestic violence order that the respondent has attempted to purchase a firearm.

THIRD DEGREE ASSAULT

HOUSE BILL 333

This bill expands the protected group of those included in third degree assault to "transportation officer appointed by a county fiscal court …to transport inmates when the county jail or county correctional facility is closed while the transportation officer is performing job related duties." This remains a Class D felony.

SENATE Bill 80

This bill also expands third degree assault to include teachers and school employees who are "acting in the course and scope of the employee's employment," and school volunteers who likewise are acting within the "scope of that person's volunteer service."

FINANCIAL FRAUD

House Bill 79

This bill makes a variety of additions to mostly KRS Chapter 434, including some of the following:

- The bill makes it unlawful to obtain or cause to be disclosed "financial information from a financial information repository by knowingly" making false statements to an employee or customer of the "financial information repository" with the intent to deceive. This is a Class D felony.
- The bill creates the crime of "trafficking in financial information," defined as "manufactures, sells, transfers, or purchases, or possesses with the intent to manufacture, sell, transfer, or purchase financial information for the purpose of committing any crime." This is a Class C felony.
- KRS 514.160, the theft of identity statute, and KRS 514.170, the trafficking in stolen identity statute, are altered to make some technical changes.

COMPUTER FRAUD

HB 193

This bill makes a variety of changes to the computer fraud statute, KRS 434.840-434.860, including some of the following provisions:

- The definitions of computer, computer network, computer program, computer software, computer system, device, intellectual property, are modernized.
- The owner of a computer is defined as the person "who has title, license, or other lawful possession of the property, a person who has the right to restrict access to the property, or a person who has a greater right to possession of the property than the actor."
- "Acting without the effective consent of the owner" is added as an element to unlawful access to a computer in the first and second degree. "Effective consent" is defined as "consent by a person legally authorized to act for the owner." Conditions rendering the consent ineffective are listed, including deception, coercion, age, mental disease or defect, or intoxication.
- Unlawful access to a computer in the second degree is altered to include as elements that the person acts without the effective consent of the owner, and that the actions result "in the loss or damage of three hundred dollars (300) or more." Unlawful access to a computer in the second degree is raised from a Class A misdemeanor to a Class D felony.
- The crime of unlawful access in the third degree is created. The elements are the same as unlawful access in the second degree, other than the damage resulting, which is under $300. Unlawful access in the third degree is a Class A misdemeanor.
- The crime of unlawful access in the fourth degree is created as a Class B misdemeanor. It is defined similarly to third degree unlawful access with no damage or loss resulting.

FLEEING OR EVADING POLICE

HOUSE BILL 193

This bill, which is covered above under computer crime, also amends KRS 520.100, fleeing or evading police in the second degree, to include flight by pedestrians, with the following elements:

- Intent to elude or flee
- Person knowingly or wantonly disobeys a direction to stop.

- Direction to stop is given by a person recognized to be a peace officer.
- Peace officer must have an articulable reasonable suspicion that a crime has been committed by the person fleeing.
- The person by fleeing or eluding causes or creates a substantial risk of physical injury to any person.

PAROLE

HOUSE BILL 93

This bill amends KRS 197.170 by requiring that when a prisoner is released from custody, the warden of the institution must notify the Circuit Court, Commonwealth's Attorney, and Sheriff of the County where the defendant was sentenced.

HOUSE BILL 142

This bill amends KRS 439.340 allowing the victim to waive notice of consideration for parole after the initial consideration.

SENATE BILL 222

This bill allows the Parole Board to parole prisoners who are wanted as a fugitive by other jurisdictions, requiring them to release the prisoner to a detainer from another jurisdiction. The release is not a "relinquishment of jurisdiction"; thus, the prisoner may be returned for parole violation.

JURORS

HOUSE BILL 781

This bill amends KRS 29A in a variety of ways, including:

- The bill expands the master list of prospective jurors in KRS 29A.040 to include those persons "filing resident individual income tax returns." Persons with valid driver's licenses and persons registered to vote in the county are retained on the master list. AOC merges the three lists to create one master list of persons eligible for jury service.
- The procedure previously outlined in KRS 29A.060 for selecting grand and petit jurors is deleted.
- The persons who may determine juror disqualification from the face of the jury qualification form is expanded from just the Chief Circuit Judge or his designee to other judges of the court, the court's clerk, a deputy clerk, the court's administrator, or a deputy court administrator designated by the Chief Circuit Judge.
- KRS 29A.100 is amended to allow the same group of individuals as above to excuse a juror from service for up to 10 days, or postpone jury service for 12 months, based upon individual circumstances. The reason for the excuse or postponement must be listed on the juror qualification form.
- Persons who have received a "restoration of civil rights" are explicitly made eligible to serve on a jury.
- The Chief Circuit Judge may grant a "permanent exemption" based upon a "permanent medical condition rendering the individual incapable of serving."
- The Chief Circuit Judge or the trial judge may not only excuse a juror from service but also may reduce the number of days of service, or postpone service for a period of up to 24 months.
- A person may not be called as a juror more than 1 time in a 24-month period, expanded from 12 months. This includes service as a juror in federal and other state court.

INTIMIDATING A PARTICIPANT IN THE LEGAL PROCESS

HOUSE BILL 571

This bill makes major changes to KRS 524, adding persons who may not be intimidated, and increasing penalties, including the following:

- KRS 524.040 changes "intimidating a witness to "intimidating a participant in the legal process." The crime is expanded to include the use of physical force or a threat against a person he believes "to be a participant in the legal process," or influencing or attempting to influence the testimony, "vote decision, or opinion" of the person. The act must be "related to the performance of a duty or role played by the participant in the legal process." The crime of intimidating a participant in the legal process remains a Class D felony.
- Protected persons include current judges or justices, trial commissioners, former judges or justice or trial commissioner, prosecutors, defense attorneys, jurors, witnesses, and the "participant's immediate family."
- The previous crime of "tampering with a witness" has the penalty raised from a Class A misdemeanor to a Class D felony.
- Jury tampering has been made a Class D felony; it was previously a Class A misdemeanor.

INMATE LAW SUITS

House Bill 86

This bill is a Department of Corrections Bill containing numerous sections related to inmate lawsuits and sentencing, including the following:

- Inmates must exhaust administrative remedies prior to bringing an action related to a disciplinary proceeding, a challenge to a sentence calculation, or a challenge to custody credit.
- Any law suit arising out of a detention facility disciplinary proceeding based upon either federal or state law must be brought within 1 year after the cause of action accrued. The date of accrual is the date "an appeal of the disciplinary proceeding is decided by the institutional warden."
- Inmates are limited in the number of law suits they may bring without paying the filing fee to 3 within a 5 year period of time if those lawsuits were "dismissed on the grounds that it is frivolous, malicious, or harassing, un-

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less the prisoner is under imminent danger of serious physical injury, without paying the entire filing fee in full."

- Department of Corrections officers and employees may have their deposition taken rather than their personal attendance required during a lawsuit, unless the court otherwise finds that the witness' personal attendance is necessary for the trial.
- Department of Corrections records related to supervision, custody, or confinement, medical charts or records may be proved by copy rather than personal testimony.
- KRS 532.110 regarding concurrent and consecutive terms of imprisonment is amended to state that when there is a silent judgment, the sentences shall run concurrently unless the provisions of KRS 532.110(3) or KRS 533.060 apply. This provision reconciled previously inconsistent statutes.
- Department of Corrections sex offender treatment is regulated by the Department of Corrections under KRS 197.400-197.440 rather than KRS 17 related to sex offender registration.

DRIVER'S LICENSES

House Bill 188

This bill changes significantly the requirements for obtaining drivers' licensing in Kentucky. It is a complex statute with many provisions, including the following provisions:

- A person with a driver's license from another state who becomes a Kentucky resident, defined as establishing "Kentucky as his or her state of domicile" who is a licensed driver must apply for a Kentucky license within 30 days of establishing residency.
- Before issuing a driver's license to a new Kentucky resident, the clerk must verify whether the person's license has been revoked in another state.
- A person who is not a US citizen but who has been granted permanent resident status obtains a license in the same manner as if he were a US citizen.
- A person who is neither a US citizen nor a permanent resident applies for a driver's license from the Transportation Cabinet. The application must be accompanied by particular documents depending upon the status of the person. If the Transportation Cabinet decides that the person should be issued a driver's license, the person takes an official form given by the Cabinet to the circuit clerk who then reviews the person's documentation and the official form.
- The statute makes changes to the procedure for obtaining a "nondriver's identification card," making it consistent with the procedures for obtaining a driver's license.
- A person may drive with another state's driver's license for a period of 1 year after entering Kentucky. A college student is exempted from this requirement. A person who is not a citizen may drive for up to one year with his domestic license.

House Bill 652

This bill allows for the use of ignition interlock devices in lieu of parts of license revocations and suspension periods, including some of the following provisions:

- A person who has had their license revoked for having committed DUI 2nd, 3rd, or 4th, may move the court to reduce the revocation period by half, and in no case less than 12 months. The Court may grant the motion so long as the person does not drive without an ignition interlock device, so long as the person drives only under the conditions set by the court, and so long as the person has an ignition interlock device installed on their car.
- A person who has been convicted of driving while his license is revoked or suspended for a DUI, 2nd or 3rd offense, may after 1 year of revocation move the Court to be allowed to drive with an ignition interlock device for the remaining period of revocation.
- The Court shall dissolve the order upon finding a violation of the conditions. If violated, the person receives no credit toward his violation period.

COURT COSTS

House Bill 452

This is the Court Costs Bill that came through the Kentucky Criminal Justice Council as a result of work done by the subcommittee of the Council's Penal Code Committee. It establishes one court cost of $100 in criminal cases both in circuit and district court, with these other provisions:

- Court costs are mandatory subject to "nonimposition" only if the "court finds that the defendant is a poor person as defined by KRS 453.190(2) and that he or she is unable to pay court costs and will be unable to pay the court costs in the foreseeable future." If the defendant does not meet the standard but still is unable to pay, the court must set a show cause date for the full payment. The court may establish an installment payment plan for the payment of the court cost, fees, and fines, which must be paid within 1 year of sentencing. This requirement is irrespective of responsibilities for paying restitution and "other monetary penalties."
- Money received during the year installment plan are to be applied "first to court costs, then to restitution, then to fees, and then to fines."
- The $100 court cost is imposed whether the offense is prepayable or not. Parking fines that are prepaid do not carry a court cost.
- Court costs require a conviction.
- The KRS 31.051(2) administrative fee for the Department of Public Advocacy is abolished.
- A Court Cost Distribution Fund is created. Court costs are sent to the Finance and Administration Cabinet, which makes monthly disbursements of the fund to various entities. The Department of Public Advocacy receives 3.5% up to a cap of $1,750,000. The Crime Victims' Compensa-

tion Board receives 3.4% with a cap of $1,700,000. The Kentucky Local Correctional Facilities construction Authority receives 10.8% up to $5,400,000. .7% up to $350,000 goes to the Justice Cabinet for Brady Act records checks and "for the collection, testing, and storing of DNA samples." 5.5% goes to the county to pay for the costs of the operation of the county jail and for the transportation of prisoners..

- Numerous other costs are no longer paid through the circuit clerk but are paid directly to the entity, such as the Natural Resources and Environmental Protection Cabinet, statutorily authorized to receive the particular damage assessment.
- The fees assessed for the crime victims' compensation fund, the spinal cord and head injury research trust fund, and the traumatic brain injury trust fund are abolished and replaced with court costs.
- The trial court may order a fine, forfeiture, service fee, cost or other monetary penalty to be paid to a person other than the circuit clerk. When that occurs, the order is a judgment.
- The trial court may order the defendant's employer to deduct money from the defendant's wages to pay for his board, transportation costs, support of his dependents, or other obligations. These payments are not to be paid to the clerk.
- Costs for lodging in a halfway house or other facility are to be paid to the facility.
- Restitution payments are to be paid to the clerk or "a court-authorized program run by the county attorney or the commonwealth's attorney of the county."
- Supervision fees, criminal garnishments, and other similar payments are to be made to the agency or organization or person rather than to the clerk, except for those payments owed to the Department of Corrections. For example, reimbursement of incarceration costs is paid to the jailer, while reimbursement for incarceration costs owed to the Department of Corrections is paid to the clerk.

KENTUCKY PRIVATE INVESTIGATORS LICENSING ACT

SENATE BILL 139

This bill establishes extensive regulatory authority over private investigators, including some of the following provisions:

- A Board of Licensure for private investigators is created with membership to be appointed by the Governor. The Board consists of 7 members, with one Assistant Attorney General, a county sheriff, a municipal police officer, a citizen, and 3 private investigators.
- The Board is given regulatory authority, including the administration of a licensing examination.
- The board is given investigative and disciplinary authority over private investigators.
- A person must have a license to hold herself out to the public as a private investigator.
- "Private investigating" is defined, including "the business of obtaining or furnishing information with reference to crime or wrongs done or threatened against the United States or any state or territory of the United States…"
- To become licensed as a private investigator, among many qualifications, a person must be 21 years of age, be a citizen or resident alien, have a high school education or its equivalent, have been free for 10 years from a felony conviction, not have a misdemeanor involving moral turpitude or dishonesty within the previous 5 years, not have been dishonorably discharged, not have "chronically and habitually" used alcoholic beverages or drugs, and otherwise be of good moral character.
- This statute does not apply to employees of the Commonwealth of Kentucky or "any political subdivision thereof, performing his or her official duties with the course and scope of his or her employment." Nor does the statute apply to an attorney or an attorney's employee.

MISCELLANEOUS STATUTES

HOUSE BILL 52

This bill gives County Attorneys the authority to employ detectives similar to Commonwealth's Detectives.

HOUSE BILL 521

This bill, in addition to amending several statutes regulating public and private cemeteries, changes desecration of venerated objects from a Class D to a Class C felony. Violating graves is amended from a Class A misdemeanor to a Class D felony. There are also changes to the abuse of a corpse statute, including the following provisions:

- The definition of abuse of a corpse is expanded to include entering into a contract and accepting remuneration "for the preparation of a corpse for burial or the burial or cremation of a corpse and then deliberately fail[ing] to prepare, bury, or cremate that corpse in accordance with that contract."
- Abuse of a corpse is a Class D felony when the person entering into the contract fails to prepare, bury, or cremate a corpse after accepting money to do so.

HOUSE BILL 62

This bill creates a Class A misdemeanors for the "destruction, removal, sale, gift, loan, or significant alteration" of either a military heritage site or a military heritage object. A subsequent offense is a Class D felony. ■

Ernie Lewis, Public Advocate

Governor Patton Appoints Justice and Public Protection Secretaries


Governor Paul Patton

(Frankfort, April 25, 2002) Governor Paul Patton today appointed Insurance Commissioner **Janie Miller** as the new Public Protection Cabinet Secretary and Kentucky State Police Commissioner **Ishmon Burks** as the new Justice Cabinet Secretary. Miller and Burks will remain commissioners of their respective agencies while serving as cabinet secretaries.

"The main strength of these two outstanding leaders is their visionary plans that have advanced Insurance and KSP during their tenure," Patton said. "These are two key cabinet positions, and we have promoted the right individuals to oversee the programs and agencies of Public Protection and Justice that are so important to the citizens of Kentucky."

The two vacancies result from the resignation of Public Protection Secretary Ron McCloud and the death of Justice Cabinet Secretary Robert F. Stephens.

The Public Protection Cabinet consists of the Department of Alcoholic Beverage Control, the Department of Charitable Gaming, the Kentucky Board of Tax Appeals, the Kentucky Racing Commission, the Public Service Commission, the Department of Financial Institutions, the Board of Claims, the Crime Victims Compensation Board, the Department of Public Advocacy, the Petroleum Storage Tank Environmental Assurance Fund, the Department of Mines and Minerals, the Department of Housing, Buildings and Construction, and the Department of Insurance.


Janie Miller

Gov. Patton appointed Miller commissioner of Department of Insurance in January 2001, and she previously served as Deputy Commissioner of Health Insurance. Miller was instrumental in developing Kentucky Access, a health insurance pool focused on providing more affordable insurance to Kentuckians with high-cost medical conditions who must buy their own insurance. She also oversaw the implementation of all health-related patient protections from the 1998 and 2000 legislative sessions, including external appeals rights and patient access to adequate provider networks. Miller has a bachelor's degree from Eastern Kentucky University.

"Janie Miller has a wealth of knowledge that will serve Public Protection and the many agencies within that cabinet," Patton said. "Her success in dealing with the difficult responsibility of protecting the public through regulation of Kentucky's insurance market is a true sign of her leadership ability and her commitment to the citizens of the Commonwealth."

Ernie Lewis, Public Advocate, adds, "Governor Patton has remained consistent with these two appointments in continuing to stress competence and ability. Secretary Miller is a skilled administrator who has an excellent relationship with members of the General Assembly, and who understands the day-to-day workings of the Public Protection and Regulation Cabinet. She will make an outstanding Cabinet Secretary.


Ishmon Burks

Likewise, Ishman Burks has had a storied career, and this appointment demonstrates the continuation of that career. He brings a no-nonsense, quiet strength to the administration of one of Kentucky's most important Cabinets. I look forward to working on improving the criminal justice system with this excellent Cabinet Secretary."

The Justice Cabinet consists of the Department of Corrections, the Department of Criminal Justice Training, the Kentucky State Police, the Department of Juvenile Justice, the Medical Examiners Office, the Kentucky Criminal Justice Council and the Parole Board.

Burks became the first African-American commissioner of the state's premiere law enforcement agency when he was appointed Aug. 22, 2000.

Burks, a native Kentuckian, is a retired colonel in the United States Army. He holds degrees in education and criminology, and his distinguished military and civic accomplishments include serving as acting inspector general for military police units in Europe, commanding a 900-member military police force in seven European communities, and heading up military police assignments worldwide. He was also Battalian Commander for the military police training school at Ft. McClellan, as well as being selected for the Criminal Investigation Brigade command.

"Ishmon's military background gives him the solid base he needs to work within a large organization that must stay focused on each and every employee," Patton said. "And his positive outlook on state government and this administration assures us that we're promoting the best man for the job." ■

Governor Paul E. Patton Honored by Kentucky Bar Association

Kentucky Governor Paul E. Patton will be presented the Kentucky Bar Association President's Special Service Award at the KBA's Annual Convention Membership Luncheon, held in Covington on June 13, 2002. Recipients of the Special Service award are selected by the President of the Kentucky Bar Association for their dedication to the service of the citizens of the Commonwealth.

Governor Patton is presented the KBA President's Special Service Award, in part, for his advancement of the Kentucky Department of Public Advocacy Program, which provides public defender legal representation to 100,000 indigents accused of or convicted of a crime through 26 regional offices across the state. He has demonstrated his dedication to all Kentuckians through his leadership in supporting increased funding for legal services for underprivileged Kentuckians.

The Kentucky Bar Association, an agency of the Supreme Court of Kentucky, is the unified professional and regulatory association of the Kentucky Legal profession.

The plaque being presented to the Governor reads, "In recognition of your leadership and support of increased funding for Kentucky public defenders and your commitment to increasing access to justice for all Kentuckians."

DPA's Public Advocate, Ernie Lewis said, "Governor Patton has exercised extraordinary leadership on indigent defense in Kentucky. He has acted in the tradition of former Governor Wendell Ford, who created the Department of Public Advocacy. Governor Patton was receptive to the *Blue Ribbon Group's* message in 1999 that Kentucky's funding of indigent defense was among the lowest in the nation. He placed $10 million into his 2000 budget to raise the funding level for the Department of Public Advocacy, resulting in significantly higher defender salaries, progress in completing the full-time system, and lower caseloads. In 2002, when the revenue picture was bleak, he placed money in his budget to complete the full-time system. He could have treated indigent defense as an area that he simply could not reach given the revenue picture. Instead, like the excellent leader that he is, he stayed committed to completing the *Blue Ribbon Group* recommendations. I personally appreciate all the Governor has done, and want him to know that every public defender and many indigent persons and their families thank him for his leadership. I also personally want to thank the Kentucky Bar Association for this long overdue recognition."

The President of the Kentucky Bar Association, Beverly R. Storm of Covington, KY, said, "As we recognize the 30th Anniversary of the Department of Public Advocacy, it was especially appropriate to also recognize the role of Governor Patton in - at long last - providing the Department with increased resources to carry out its functions." ■

Department of Public Advocacy's Kentucky Innocence Project

The Department of Public Advocacy (DPA) has responded to the public's concern about innocent people behind bars by creating the *Kentucky Innocence Project* (KIP). KIP assists those in Kentucky's prisons who declare their actual innocence and who have new evidence to support their innocence. KIP began taking requests for assistance from Kentucky inmates in September, 2000 and has been contacted by over 250 prisoners. The Project is actively investigating 16 cases with another 61 under review for assignment.

The nation has been startled by the repeated reports of innocent people being freed from prisons all across the country. The shock comes not from the justified release of innocent people, but from the sheer numbers of actually innocent people found in the nation's prisons.

Kentucky has experienced the uncovering and freeing of the innocent. William Gregory, a 45 year old Jefferson County man was convicted and sentenced to 70 years for the rape of a 70-year old woman in 1992. New DNA tests proved he did not commit that crime for which he served 8 years. Innocent people have been sent to prison in Kentucky. No Kentuckian wants an innocent person incarcerated.

Kentucky's KIP is modeled after successful programs such as the Innocence Project at Cardoza Law School under the direction of Barry Scheck, the Innocence Project Northwest at the University of Washington School of Law and the Center for Wrongful Convictions at Northwestern University. It utilizes volunteer students from Kentucky universities and law schools. Gordon Rahn of DPA's Eddyville post-conviction office is coordinating this DPA effort with the oversight of post-conviction branch manager, Marguerite Thomas and the direction of DPA Post-Trial Director Rebecca DiLoreto.

The Kentucky Innocence Project has been the recipient of two IOLTA grants from the Kentucky Bar Association. The grants are utilized to cover expenses incurred by the volunteers and externs as part of the investigations and to pay for the expensive DNA testing required by some of the cases. KIP has one DNA test pending at a cost of $5,000+ and it is anticipated that KIP could request DNA testing in another 5-10 cases in the next year.

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Professor Roberta Harding led the way to establish a course at the University of Kentucky Law School. Students are required to attend a specially designed class and conduct an investigation on their assigned cases. The investigation is done under the supervision of Professor Harding and KIP/DPA personnel. The College of Social Work at the University of Kentucky, under the guidance of Professor Pamela Weeks, also had students volunteer to work on cases and provided valuable background information for not only their assigned cases but cases that UK law students were working on.

The Kentucky Innocence Project: Top, L-R: Gordon Rahn, Debbie Baris, Tom Williams, Steve Florian, Prof. Mark Stavsky Bottom, L-R: Alexandria LuSans-Otto, Marguerite Thomas, Diana Queen, Beth Albright

Chase Law School at Northern Kentucky University established a similar program for the 2001-2002 academic year. Professor Mark Stavsky was instrumental in setting up the program at Chase. Professor Stavsky will be taking a sabbatical during the next year, but will continue to work with the project at Chase along with Professor Mark Godsey. Nine Chase students have already registered for the fall term and will begin the work on new cases in September.

The selection process for the new cases to be assigned to the 2002-2003 student externs/volunteers will take place through the summer months. Criteria for consideration by KIP is substantial:

- Kentucky conviction and incarceration;
- Minimum 10 year sentence;
- Minimum of 3 years to parole eligibility OR if parole has been deferred, a minimum of 3 years to next appearance before the parole board; and
- New evidence discovered since conviction or that can be developed through investigation.

If an inmate's case satisfies all the four criteria, he or she is sent a detailed 20-page questionnaire for specific information about the case.

DNA testing and challenges of the Innocence Project at Cardoza Law School led by Barry Scheck and Peter Neufeld have demonstrated there are in prison those that are innocent. DNA has exonerated 105 people in the past few years. National estimates put the number of innocent people incarcerated in the nation's prisons between 4%-10%. Scheck and Neufeld in their book, *Actual Innocence* (2000) list the factors they found led to wrongful convictions:

1) Mistaken eyewitness identification;
2) Improper forensic inclusion;
3) Police and prosecutor misconduct;
4) Defective and fraudulent science;
5) Unreliable hair comparison;
6) Bad defense lawyering;
7) False witness testimony;
8) Untruthful informants;
9) False confessions.

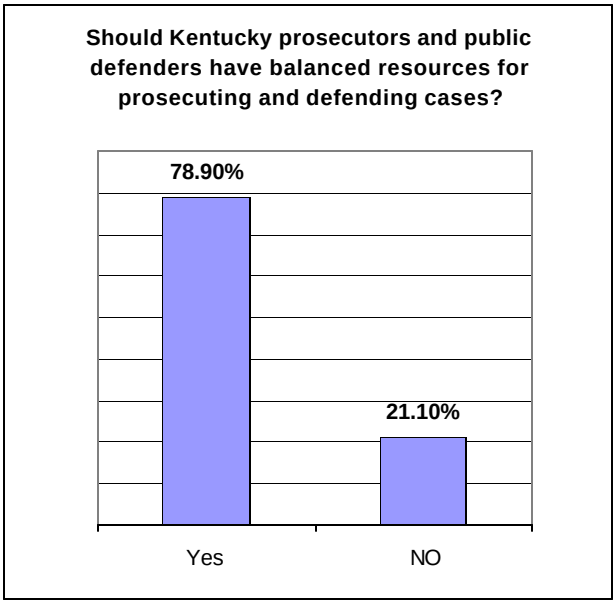
Race plays a role in this process. Scheck and Neufeld reported in *Actual Innocence* that the race of the exonerated defendants was: 29% Caucasian; 11% Latino; and 59% African American.

George F. Will in an April 6, 2000 Washington Post review of *Actual Innocence* recognized the importance of wrongly convicting the innocent and the affect of *Actual Innocence* when he said, "It should change the argument about capital punishment...You will not soon read a more frightening book... Heartbreaking and infuriating." The Sunday, Sept. 15, 2000 Boston Globe said of *Actual Innocence*, "One of the most influential books of the year...shocking…compelling…an objective reference for partisans of all stripes."

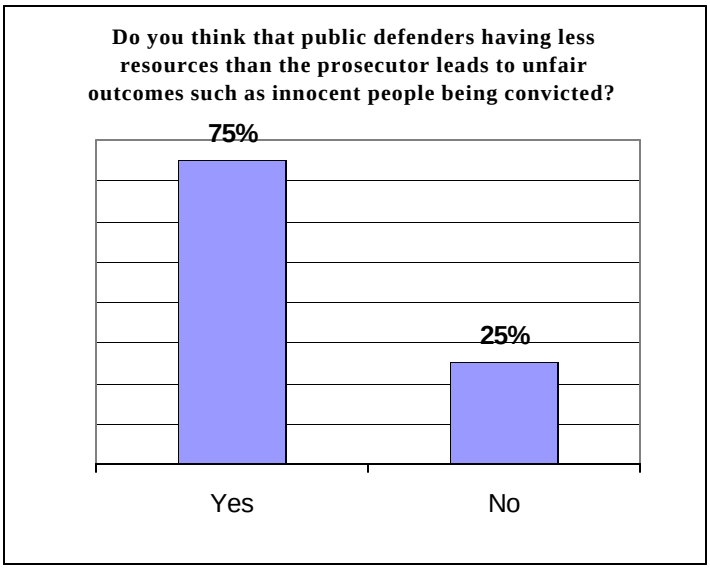
Americans want the wrongly convicted to be able to prove their innocence with scientific testing. A Gallup poll, conducted March 17-19, 2000 finds "that 92% of Americans say those convicted before the technology was available should be given the opportunity to submit to DNA tests now — on the chance those tests might show their innocence. Support for this position runs solidly across all demographic groups, as well as all political ideologies…. Mark Gillespie, "Americans Favor DNA 'Second Chance' Testing for Convicts:Nine in ten Americans support genetic testing to resolve long-held claims of innocence," GALLUP NEWS SERVICE, http://www.gallup.com/poll/releases/pr000601b.asp.

The Department of Public Advocacy continues to work to effectively represent Kentucky's indigent, especially those wrongly convicted. ■

8 Out Of 10 Kentuckians
Want Public Defenders and Prosecutors to Have Balanced Resources



75% of Kentuckians Fear Less Resources For Defenders Leads to Risk of Innocent Being Convicted



Results of *Spring 2001 Kentucky Survey* with 841 interviews completed between July 13 until September 7, 2001 by the University of Kentucky Survey Research Center. The margin of error is approximately ± 3.4 percentage points at the 95 percent confidence level.

LAMBERT RE-ELECTED CHIEF JUSTICE

(Frankfort, Kentucky, April 18, 2002) The Supreme Court of Kentucky has elected **Joseph E. Lambert** to a second term as Chief Justice. Seven Justices, elected from districts across Kentucky, comprise the Supreme Court, which is Kentucky's highest court. Its Chief Justice is the executive head of the court system and oversees the operation of the Administrative Office of the Courts, the 3300 employees of the Court of Justice, and submits a biennial budget to the Kentucky General Assembly.

On being re-elected by his colleagues, Chief Justice Lambert said "It is truly an honor to have been elected for another four year term as Kentucky's Chief Justice. Our court system has made significant strides in the last four years in responsiveness, improvement of public trust and confidence, and better understandings of racial and ethnic differences, and I look forward to our continued work."

During Lambert's first term as Chief Justice, he oversaw the planning and construction of twenty-three new courthouse facilities, the creation and implementation of twenty-seven new judgeships including fourteen new family courts. In addition, Chief Justice Lambert achieved passage of the Senior Status Judges Act which uses retired judges to fight backlog and delay in Kentucky's courts, created special commissions on racial fairness and the courts and empowered change to ensure fair treatment for all of Kentucky's citizens. Lambert has also overseen a rapid expansion in the use of computer technology in Kentucky's courts, using the internet and statewide networks to improve efficiency and accuracy in the work of the courts. Lambert also worked with the Kentucky General Assembly to place on the November 5, 2002, election ballot the Family Court Constitutional Amendment which will remove all legal doubts about this specialty court, designed to protect the families and children of Kentucky.

Chief Justice Joseph E. Lambert

Public Advocate Ernie Lewis says, "I have known the Chief Justice since he was an outstanding Mt. Vernon trial lawyer. He has earned the confidence of the entire court system through his excellent administration, creative vision for the Court of Justice, and continued scholarship in his opinions. He has been a friend of indigent defense, as a member of the *Blue Ribbon Group*, believing in a balanced criminal justice system. I look forward to a continued good relationship."

Chief Justice Lambert lives in Mt. Vernon, Kentucky, with his wife, Debra, and two sons, Joseph and John. ■

Legislative Update
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